

A **AEON CO (M) BHD v. ASIA PLYWOOD COMPANY SDN BHD
& ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
AZIZAH NAWAWI JCA

B MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NOS: W-03(IM)(NCVC)-30-04-2019
& W-03(IM)(NCVC)-32-04-2019]
9 DECEMBER 2020

C **CIVIL PROCEDURE:** *Damages – Assessment – Wrongful entry of private caveat – Assessment ordered by judge – Deputy Registrar dismissed application for assessment – Whether Deputy Registrar could dismiss application after completion of evidentiary hearing – Whether Deputy Registrar to certify amount of damages – Rules of Court 2012, O. 37 r. 1*

D **LAND LAW:** *Caveat – Private caveat – Wrongful entry of private caveat – Whether proven – Whether caused loss and damage – Amount of damages – Computation of loss – Whether offer by prospective purchaser ought to be accepted as reflection of true commercial value of land in absence of other evidence – Whether claim for damages was statutory remedy provided under s. 329(1) of National Land Code – Whether claim for diminution of value of land ought to be allowed*

E Asia Plywood Company Sdn Bhd ('plaintiff') and Aeon Co (M) Bhd ('first defendant') entered into a sale and purchase agreement ('SPA') for the sale of a piece of freehold land ('land') on 3 June 2011, subject to conditions precedent. The first defendant entered a private caveat against the title to the plaintiff's land. Unfortunately, the conditions precedent in the SPA could not be fulfilled in time, causing the plaintiff to issue a letter to the first defendant, stating that the agreement had lapsed and extension of time was refused. The defendant thus sought a decree of a specific performance of the SPA ('SP suit'). The court, on 2 September 2013, allowed a conditional decree for specific performance by granting an extension of six months to the first defendant to fulfil the conditions precedent and if failed, the agreement would lapse and become void. However, the first defendant failed to fulfil the conditions precedent and applied for further extension. The application was dismissed. The first defendant appealed against the decision. The first defendant also refused to withdraw the private caveat. Hence, the plaintiff filed an originating summons ('OS') under O. 37 r. 1 of the Rules of Court 2012 ('ROC') for the removal of the private caveat. On 18 December 2014, the first defendant took out another application in the SP suit for a further extension of time of the SPA. However, the application was dismissed and the first defendant appealed against the decision. On 29 March 2016, the

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Court of Appeal dismissed with costs both the appeals filed by the first defendant. Nevertheless, the first defendant continued to maintain the private caveat, and it was only withdrawn on 3 May 2016. A

The plaintiff's application in the OS was heard pursuant to s. 329 of the National Land Code ('NLC'). On 5 August 2016, the court allowed the plaintiff's prayer for damages against the first defendant. Aggrieved, the first defendant appealed. On 30 March 2017, the Court of Appeal upheld the decision but the order was varied to the extent that the damages was to be assessed for the period between 8 August 2014 and 3 May 2016. During the assessment of damages, the Deputy Registrar found that the plaintiff had failed to prove the loss allegedly suffered and thus no award was made. The plaintiff appealed and the appeal was allowed by the judge wherein the decision of the Deputy Registrar was set aside and the plaintiff was awarded the sum of RM2,410,074.53 as damages. The judge also allowed the expenses in obtaining the valuation report of the property and the professional fee and reimbursement in the sum of RM99,269. Hence, the appeal by both the plaintiff and the first defendant. The issues for the determination by the court were: (i) whether the plaintiff had succeeded in proving that the wrongful entry of the private caveat by the first defendant had resulted in loss and damage to the plaintiff; (ii) whether the computation of the loss incurred by the plaintiff was correct; and (iii) whether the plaintiff was entitled to claim for diminution of value of the land. B C D E

Held (dismissing appeals)

Per Mohd Sofian Abd Razak JCA delivering the judgment of the court:

- (1) The order for the assessment of damages against the first defendant was made pursuant to s. 329 of the NLC when the court held that the first defendant had no reasonable cause of action to maintain the private caveat on the plaintiff's land. However, the plaintiff's application for assessment of damages was dismissed by the Deputy Registrar on the basis that the plaintiff had failed to prove the loss allegedly suffered. Under O. 37 r. 1 of the ROC, the Deputy Registrar was to certify the amount of damages and it does not provide for the dismissal of a claim for damages after the completion of the evidentiary hearing. Hence, the judge was correct in reversing the findings of the Deputy Registrar. (paras 28, 31 & 33) F G
- (2) The price of RM60 psf offered by the prospective purchaser, Ivory Properties Group Bhd ('IPGB'), ought to be accepted as the best reflection of the true commercial or market value of the land. The evidence showed that there was no other prospective purchaser as at 3 May 2016 because of the poor market sentiments. Following a feasibility study, with the offer of RM60 psf, the company could still make a reasonable profit from the purchase and development of the H I

- A land. As part of the agreement, IPGB would have asked the plaintiff to convert the category of land use from agriculture to commercial as the offer was made on the basis that the land would be commercialised. (paras 49-52)
- B (3) There was no manifest error in the findings of the judge that the sum of RM2,410,074.53 was with interest of which the sum of RM2,310,805.53 was on account of fixed deposit interest rate of 3.1% per annum as at July 2014. Further, there was no rebuttal evidence from the first defendant as to what would otherwise be the appropriate bank interest rate at the material time and therefore, the plaintiff's calculation was accepted. The findings were thus affirmed. (paras 55-57)
- C (4) The damages claimed by the plaintiff was not a cause of action in tort but was premised on a statutory remedy provided under sub-s. 329(1) of the NLC. Its purpose was to compensate the plaintiff and not to cause unjust enrichment to the plaintiff. Since the court had allowed the plaintiff's claim on interest which could have been earned, but for the private caveat, it was only fair that the claim for diminution of the value of the land was disallowed. The costs incurred in obtaining a report and valuation of the property in the sum of RM99,269 being the professional fees and reimbursement was also allowed. (paras 60 & 62)
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- E **Case(s) referred to:**
Abriq Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 10 CLJ 7 HC (*refd*)
Hollebone v. Midhurst and Fernhurst Builders [1968] 1 Llyod's Rep 38 (*refd*)
Lau Foo Sun v. Government Of Malaysia [1970] 1 LNS 56 FC (*refd*)
- F *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516 CA (*refd*)
Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA (*refd*)
Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157 (*refd*)
Ting Sieh Chung v. Hock Peng Realty Sdn Bhd [2012] 1 LNS 574 CA (*refd*)
- G **Legislation referred to:**
National Land Code, s. 329(1)
Rules of Court 2012, O. 37 r. 1
- Other source(s) referred to:**
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia: Cases and Commentary*, 3rd edn, LexisNexis, 2012, pp 732-733
- H *For the appellant - Doshi Jyotsana, R Jayasingam & Ng Keng Yang; M/s BH Lawrence & Co*
For the respondent - Lim Choon Khim, Chin Yan Leng & David Yii; M/s Chooi, Saw & Lim
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[Editor's note: For the High Court judgment, please see Asia Plywood Company Sdn Bhd v. Aeon Co (M) Bhd & Anor [2020] 3 CLJ 685 (affirmed).]

Reported by S Barathi

JUDGMENT

Mohd Sofian Abd Razak JCA:

Introduction

[1] There are two separate appeals before this court emanating from the decision of the High Court dated 22 March 2019, namely:

- (i) in Civil Appeal No.: W-03(IM)(NCVC)-30-04-2019, the appellant is the first defendant in the High Court and the respondent is the plaintiff. The appellant is appealing against the whole of the decision of the learned Judicial Commissioner setting aside the decision of the learned Deputy Registrar and awarding damages, interest and costs to the respondent; and
- (ii) in Civil Appeal No.: W-03(IM)(NCVC)-32-04-2019, the appellant is the plaintiff and the respondent is the first defendant. The appellant is appealing against part of the decision the learned Judicial Commissioner disallowing the appellant's claim for diminution of the value of the land in the amount of RM9,190,560.

[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

[3] Having considered the appeal records and the submissions of the parties in these appeals, it is our unanimous decision that both appeals be dismissed with costs to be borne by each party.

Background Facts

[4] On 3 June 2011, both the plaintiff and the first defendant had entered into a sale and purchase agreement ("the SPA") whereby the plaintiff agreed to sell to the first defendant a piece of freehold land held under GRN 181086 ("the said land") with the purchase price of RM36,019,241.28 for the purpose of operating the business of shopping centres and departmental stores but subjected to conditions precedent set out in paras. (a) to (f) of cl. 2.1 of the SPA.

[5] Clause 2.2 stated the consequences of such non-fulfilment whereby upon the expiry of the conditional period or such other mutually extended period, either party shall be entitled to terminate the agreement by serving a written notice. Upon receipt of such notice:

- A (i) the plaintiff shall refund or cause to be refunded the first defendant all monies paid with interest accrued; and
- (ii) in exchange thereof, the first defendant shall withdraw any private caveat or other encumbrances at their own cost and expenses.
- B [6] On 4 July 2011, the first defendant entered a private caveat against the title to the plaintiff's land ("the private caveat").
- [7] Unfortunately, the conditions precedent in the SPA could not be fulfilled in time. The plaintiff then issued a letter to the first defendant stating that the agreement has lapsed and refused for the extension.
- C [8] In reaction to that, the first defendant took out an Originating Summons No.: 24NCC-375-10-2012 for a decree of a specific performance of the SPA ("SP Suit"), which had been allowed by the court on 2 September 2013, whereby the court allowed a conditional decree for specific performance by granting an extension of six months for the first defendant
- D to fulfil the conditions precedent. Under the terms of the order in the SP Suit, the court further stated that if the first defendant fails to fulfil the conditions precedent by 2 March 2014, the agreement would lapse and become void.
- [9] However, the first defendant failed to fulfil the conditions precedent and applied to the court for further extension. On 7 July 2014, the first
- E defendant's application for an extension of time was dismissed. The first defendant appealed against this decision.
- [10] The first defendant had also refused to have the private caveat withdrawn.
- F [11] Therefore, in September 2014, the plaintiff filed an Originating Summons No.: 24NCC-1425-09-2014 ("OS1425") under O. 37 r. 1 of the Rules of Court 2012 ("ROC 2012") to have the private caveat removed together with other ancillary reliefs.
- G [12] On 8 December 2014, the first defendant took out another application in the SP Suit for a further extension of time of the SPA. However, such application had been dismissed by the court on 15 January 2015 with costs. The first defendant appealed against this decision.
- [13] On 29 March 2016, the Court of Appeal dismissed with costs both of
- H the aforesaid appeals filed by the first defendant. Despite of this decision, the first defendant continued to maintain the private caveat.
- [14] It was only until the case management of OS1425 on 3 May 2016, that
- I the first defendant represented to the learned judge that they will withdraw the private caveat. The private caveat was withdrawn by the first defendant on 3 May 2016.

[15] The learned judge in OS1425 proceeded to hear the plaintiff's application pursuant to s. 329 of the National Land Code (Act 56 of 1965) ("NLC") for damages against the first defendant. A

[16] On 5 August 2016, the court allowed the plaintiff's prayer for damages and had made an order against the first defendant upon a finding that the first defendant had no reasonable cause of action to maintain its private caveat on the plaintiff's land and that the legal requirement under s. 329 of the NLC have been fulfilled. Besides, the learned judge found that there was *prima facie* evidence of loss or damage. B

[17] The order of the High Court on 5 August 2016 was as follows: C

1. Bahawa satu perintah gantirugi terhadap defendant pertama diberikan dan gantirugi tersebut ditafsirkan di hadapan Timbalan Pendaftar; dan
2. Bahawa Defendan Pertama hendaklah membayar kos sebanyak RM7,500.00 kepada Plaintiff. D
3. Fi alokatur adalah sebanyak 4% daripada jumlah kos.

[18] Thus, aggrieved by the decision of the High Court, the first defendant appealed against such decision and on 30 March 2017, the Court of Appeal upheld the decision of the High Court but varied the order to the extent that the damages was to be assessed for the period between 8 August 2014 and 3 May 2016. E

[19] The assessment of damages was then heard by the learned Deputy Registrar through oral and documentary evidence of witnesses.

[20] In the proceeding before the learned Deputy Registrar, three issues had been identified as follows: F

- (i) whether the plaintiff had suffered loss;
- (ii) whether the plaintiff had calculated a proper sum/figure for the loss; and
- (iii) whether the plaintiff is entitled to claim for diminution of value of the said land. G

[21] On 16 August 2018, the learned Deputy Registrar found that the plaintiff failed to prove the loss allegedly suffered and no award of damages was made. Each party was ordered to bear their own costs. H

[22] Being dissatisfied with the decision of the learned Deputy Registrar, the plaintiff appealed to the learned judge in chambers *vide* a notice of appeal dated 24 August 2018. I

- A [23] On 22 March 2019, the learned judge allowed the plaintiff's appeal and set aside the decision of the learned Deputy Registrar and awarded the sum of RM2,410,074.53 as damages to the plaintiff with costs of RM20,000 to the plaintiff for the proceeding before the learned Deputy Registrar and also the appeal. The learned judge also allowed the expenses awarded in
- B obtaining the valuation report of the property being the professional fee and reimbursement as per the invoice of Henry Butcher Malaysia (Kedah) Sdn Bhd dated 11 May 2017 in the sum of RM99,269. The learned judge also allowed the claim for interest at the rate of 3.1% per annum as at July 2014 in the sum of RM2,310,805.53 which could have been earned on the sale of
- C the said land to IPGB but for the private caveat. The plaintiff's claim for diminution of the value of the land was not allowed. In this regard, the plaintiff's claim for diminution of the value is premised on a statutory remedy under sub-s. 329(1) of the NLC. Thus, the purpose of damages in present context is to compensate the plaintiff and not to cause an unjust enrichment to the plaintiff.

- D [24] Both the plaintiff and the first defendant appealed against the said order of the High Court.

The Appeal

- E [25] The first appeal is premised on the following grounds:
- (i) that the court had erred in law and in fact by failing to consider or give proper and due judicial consideration to the relevant facts, and considered irrelevant facts, in arriving at the decision;
- F (ii) that the court had erred in law and/or in fact in reversing the decision of the Deputy Registrar dated 16 August 2018. In this regard:
- (a) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the Deputy Registrar has made the decision dated 16 August 2018 after a thorough trial involving six witnesses and *viva voce* evidence for the assessment of damages;
- G and
- (b) that the court had erred in law and/or in fact in failing to consider that the Deputy Registrar has not committed any manifest error in arriving at the decision;
- H (iii) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the plaintiff has failed to prove real and actual loss. In this regard:

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- (a) that the court had erred in law and/or in fact in failing to determine/consider and/or appreciate the fact that there was no evidence of any property value loss or any other loss being suffered by the plaintiff which required a monetary award as compensation pursuant to s. 329 of the NLC; A
- (b) that the court had erred in law and/or in fact in failing to determine/hold that the plaintiff's own valuer has established and proved that the price of the said land has appreciated in value; B
- (c) that the court had erred in law and/or in fact in failing to recognise/appreciate that the subject land is an agricultural land at all material times and that the plaintiff had in fact had no prospective buyer or prospective purchaser to purchase the said land at the price as alleged or claimed by the plaintiff; C
- (d) that the court had erred in law and/or in fact in failing to recognise/take cognisance of the fact that purported potential purchaser has clearly admitted that they would not pay RM60 psf for agricultural land; D
- (e) that the court had erred in law and/or in fact in failing to consider that the plaintiff has not adduced any evidence and/or failed to adduce any evidence to show that there is any potential purchaser who is willing to buy the agricultural land at the material time; E
- (f) that the court had erred in law and/or in fact in failing to take into account the fact that in light of the price of the subject land having appreciated in value that no monetary sum ought to be awarded to the plaintiff and/or in the circumstances of this case and taking into account the evidence adduced (at the hearing of the assessment of damages) any award of a monetary sum to the plaintiff would amount to an unjust enrichment in that the plaintiff would be making a profit which would run contrary to the concept of "compensation" as envisaged by s. 329 of the NLC; F
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- (iv) that the court had erred in law and/or in fact in failing to consider that the plaintiff had in fact not offered the said land for sale after the private caveat was removed which showed that the plaintiff had not established any loss for which the compensation would be payable pursuant to s. 329 of the NLC; H
- (v) that the court had erred in law and/or in fact in failing to give proper and due judicial consideration that the award of the damages of RM2,410,074.53 to the plaintiff is in fact enriching or conferring an additional benefit on the plaintiff at the expense of the first defendant looking at the fact that the said land has appreciated in value; and I

- A (vi) that the court had erred in law and/or in fact in holding that the decision made by the High Court on the 5 August 2016 and based the grounds of the said decision stating that there was “*prima facie*” evidence of loss should or ought to be interpreted to mean that a monetary sum ought to be awarded to the plaintiff even if the plaintiff had not led any evidence and/or any credible evidence of loss.
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[26] In the second appeal, the plaintiff’s claim for the diminution of the value of the land ought to be allowed as the plaintiff has proved at the evidentiary hearing that as at 3 May 2016 there was no longer any prospective buyer for the said land. Besides, the claim for diminution did not overlap with the court’s award of damages on interest loss. The former relates to the decline of the property value whilst the latter relates to the loss of use of money had the land been sold at RM60 psf at the material time.

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Our Decision

- D [27] Pursuant to the order of the High Court dated 5 August 2016 and the order of this court dated 30 March 2017 which ordered that an assessment of damages against the first defendant be held before the learned Deputy Registrar, on 16 August 2018 the plaintiff’s application for assessment of damages was dismissed and each party was to bear its own cost.

- E [28] The said order for an assessment of damages against the first defendant was made pursuant to s. 329 of the NLC when the court held that the first defendant had no reasonable cause of action to maintain the private caveat on the plaintiff’s land.

- F [29] Section 329 of the NLC states as follows:

329. Compensation for wrongful caveats, and limitation on repeated applications

- (1) Any person or body who, or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.
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- [30] The assessment of damages before the Deputy Registrar is pursuant to O. 37 r. 1 of the ROC 2012 which reads as follows:

Assessment of damages by Registrar (O. 37 r. 1)

- H 1(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.
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[31] It is pertinent to note that the plaintiff's application for assessment of damages was dismissed by the Deputy Registrar on the basis that the plaintiff had failed to prove the loss allegedly suffered.

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[32] Aggrieved by the said decision, the plaintiff appealed to the High Court.

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[33] In our view under O. 37 r. 1 of the ROC 2012, the learned Deputy Registrar was to certify the amount of damages and it does not provide for the dismissal of a claim for damages after the completion of the evidentiary hearing. In *Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157, Gopal Sri Ram JCA (as he then was) held that once it is held that the party is entitled to recover damages, what follows is an exercise of the assessment of those damages. If at that stage he or she is unable to evidentially establish the measure of damage suffered, nominal damages will be awarded. Hence we are of the view that the learned judge was correct in reversing the finding of the Deputy Registrar that the plaintiff had failed to prove the loss and damage suffered.

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[34] It is trite law that specific finding of facts by the Deputy Registrar as a trier of facts should not be disturbed by the High Court unless that finding was plainly wrong in light of the facts in the assessment of damages, as the Deputy Registrar had the benefit of an audio-visual advantage which the High Court did not have (see Low Hop Bing JCA in *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2012] 1 LNS 574; [2013] 2 MLJ 90 at pp. 93 to 94).

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[35] We find that the learned judge had sieved through the evidence and assess the quantum after having decided to set aside the decision of the Deputy Registrar.

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[36] In *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12; [2003] 1 MLJ 6 the Court of Appeal held that "... the principles governing an appeal from a registrar to a judge in chambers are now no different from those governing an appeal from a trial on merits from the High Court to this court. On such an appeal to this court, fresh evidence is not admissible unless the conditions set out in *Ladd v. Marshall* are met (see *Lau Foo Sun v. Government Of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70)."

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[37] The author of *Land Law in Malaysia: Cases and Commentary*, 3rd edn, LexisNexis, 2012 at pp. 732 to 733 – Teo Keang Sood & Khaw Lake Tee states as follows:

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A claimant relying on subsection 329(1) NLC thus has to prove that (i) the private caveat entered by the defendant was entered wrongfully or without reasonable cause; and (ii) that claimant had suffered damages or losses as a result of the lodgment of the private caveat. In assessing damages for such wrongful entry of a caveat, real and actual loss must be prove as opposed to what might have been the loss or damage. Compensation under subsection 329(1) NLC can only be awarded for actual damages which were reasonably foreseeable.

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A [38] The first issue to consider is whether the plaintiff had succeeded in proving as a result of the wrongful entry of the private caveat by the first defendant, had resulted in loss and damage to the plaintiff.

[39] The second issue to consider is whether the computation of the loss incurred by the plaintiff was correct.

B [40] The third issue to consider is whether the plaintiff is entitled to claim for diminution of value of the said land.

On The First Issue

C [41] It was the contention of learned counsel for the defendant that the learned judge had erred in making the order dated 22 March 2019 awarding the sum of RM2,410,074.53 with interest to the plaintiff which is made up of RM2,310,805.53 based on fixed deposit interest rate. The court has also awarded the sum of RM99,269 being the fees for the professional valuer engaged by the plaintiff.

D [42] It is further contended that the sum of RM2,310,805.53 as interest was derived at by calculating 8% of the purchase price at RM60 psf as submitted by the plaintiff which is based on reliance on the offer made by Ivory Properties Group Bhd's letter dated 21 July 2014. The contents of the said letter indicated that the said offer is "subject to terms and conditions and further negotiation".

E [43] For ease of reference the content of the said letter is reproduced herewith:

Our Ref:IPGB/EDbid/CA/LOI/3763

F 21 July 2014

EDBID Properties Sdn Bhd,
No. 152 Jalan Gurdwara,
10300 Penang,

G (Attention Ms. Ann Lee)

Dear Ms. Ann Lee

Letter Of Intent

H **Purchase Of Premises Known As Lot 2834, Seksyen 47, Daerah Kuala Muda, Mukim Bandar Petani, Kedah (Land About 8.162 Hectares) ('Land')**

We refer to the subject matter and the conversation earlier, we would like to extend our interest to make initial offer of RM60 psf subject always to the terms and conditions and further negotiation.

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We look forward to hearing the feedback from you sooner possible.
Thank you in advance.

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Yours faithfully,

Ivory Properties Group Berhad

Lee Chin Aik,
PA to Group CEO.

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[44] Learned counsel further argued whether the offer of RM60 psf was a firm offer from prospective purchaser. It was the contention of learned counsel that the evidence showed that the price of RM60 psf was for land converted to commercial use. The witness for the plaintiff namely PW2 had explained that he would not offer RM60 psf for the subject land which is categorised for agriculture use. It was further argued that the price of RM60 psf was for land converted to commercial use.

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[45] The learned judge had in her grounds of judgment opined that the plaintiff had suffered loss because no sale and purchase agreement could be signed between the plaintiff and IPGB in the period from 8 August 2014 to 3 May 2016 because of the existence of the private caveat.

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[46] On being informed that the private caveat was still lodged on the said land, IPGB would still be prepared to purchase the said land if the private caveat could be removed in three months' time. However, when PW1 told PW2 that it was uncertain when the private caveat could be removed, IPGB decided to discontinue its attempt to purchase the said land.

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[47] In the witness statement of PW2 which stated as follows:

I discussed with Dato' Low. He then decided that there was no point waiting because we wanted to tap on the property market while it was still strong. This is because the economy would be bad in the near future. So I went ahead and told Ann Lee that Ivory would no longer continue with negotiation.

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[48] It was further stated by PW2 whether IPGB is still willing to purchase the said land at RM60 psf to which PW2 replied "Of course not the property market has slowed down substantially. It would be risky to pay that price now".

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[49] Based on the above evidence, we are of the considered view that the learned judge was correct to state that IPGB as the prospective purchaser was willing to purchase the said land at RM60 psf. The evidence clearly showed that there was no other prospective purchaser as at 3 May 2016 because of the poor market sentiments. Further, PW4 opined that as at 3 May 2016, the said land could only fetch a price of either RM33,600,000 if the said land remains as agriculture land or RM43,500,000 if it is converted for commercial use.

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A [50] During re-examination of PW2, she clarified that in 2014, the offer of RM60 psf was on the basis that the said land would be commercialised and the feasibility study showed that it was profitable and feasible for that price of RM60 psf and could still make a reasonable profit.

B [51] We are in agreement with the learned judge that PW2's evidence in totality show that the offer of RM60 psf made by IPGB following a feasibility study the company could still make a reasonable profit from the purchase and development of the said land. As part of the agreement IPGB would have asked the plaintiff to convert the category of use of the said land from agriculture to commercial.

C [52] The price which the prospective purchaser (IPGB) had offered ought to be accepted as the best reflection of the true commercial or market value of the said land.

D [53] In *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662, this court held that:

The true commercial value of a property is not what any valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market.

E [54] In *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 10 CLJ 7; [2007] 5 MLJ 685 the High Court referred to *Malayan Banking Bhd v. Lim Poh Ho (supra)* and held as follows:

F [31] Further and/or in any event, the true market value of the said land could be better observed from the value attached to them by prospective purchasers as opposed to valuers. In this respect, reference is made to the decision of the Court of Appeal in *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 1 MLJ 662 wherein it was held that:

... the true commercial value of a property is not what a valuer thought it should be, but the actual price that the property would fetch on the open market.

G **On The Second Issue**

H [55] The learned judge in her grounds of judgment had stated that the sum of RM2,410,074.53 was with interest of which the sum of RM2,310,805.53 is on account of fixed deposit interest rate of 3.1 % per annum as at July 2014.

I [56] Her Ladyship further held that there was no rebuttal evidence from the first defendant as to what would otherwise be the appropriate bank interest rate at the material time and accepted the calculation of the plaintiff stipulated as follows:

- (i) If the first defendant had removed the private caveat, the plaintiff could have entered into a SPA with IPGB by 8 August 2014 for the price of RM52,690,560 (which is RM60 psf). 10% of the said sum would have been received by the plaintiff upon signing of the agreement and 2% thereof would be paid to PW1 as commission whilst the balance 8% would be placed in a fixed deposit account with an interest rate of 3.1% per annum. A
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- (ii) The balance 90% of the purchase price of RM47,421,504 would have been received by 8 December 2014 and this amount too would be deposited in a fixed deposit account to earn interest at the rate of 3.1% per annum. C
- (iii) Interest which the plaintiff could have earned, namely:
- (a) Interest from 8% of the purchase price *viz.*:

$$\text{RM4,215,244.80} \times 3.1\% \text{ (from 8 August 2014 to 7 August 2015)} = \text{RM130,672.60}$$

$$(\text{RM4,215,244.80} + \text{RM130,672.60} = \text{RM4,345,917.40})$$

$$\times 3.1\% / 365 \times 270 \text{ days (from 8 August 2015 to 3 May 2016)} = \text{RM99,658.40}$$

$$\text{Total: RM130,672.60} + \text{RM99,658.40} = \text{RM230,331}$$
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- (ii) Interest from 90% of the purchase price *viz.*:

$$\text{RM47,421,504} \times 3.1\% \text{ (from 8 December 2014 to 7 December 2015)} = \text{RM1,470,066.62}$$

$$(\text{RM47,421,504} + \text{RM1,470,066.62} = \text{RM48,891,570.62}) \times 3.1\% / 365 \times 147 \text{ days (from 8 August 2015 to 3 May 2016)} = \text{RM610,407.91}$$

$$\text{Total: RM1,470,066.62} + \text{RM610,407.91} = \text{RM2,080,474.53}$$
 F
- Thus, the total interest amounts to $\text{RM230,331} + \text{RM2,080,474.53} = \text{RM2,310,805.53}$.
- [57] We are of the view that there is no manifest error in the above findings of the learned judge and affirmed with the said findings. G

On The Third Issue

[58] The learned judge disallowed the claim for diminution of value of the said land in the sum of RM9,190,000 being the difference between price offered by IPGB of RM52,690,000 and the sum of RM43,500,000 as valued by PW4. Learned counsel for the plaintiff submitted that after the withdrawal of the private caveat on 3 May 2016 there were no offers to purchase the said land. H
I

A [59] In disallowing the plaintiff's claim for diminution of value of the said land, the learned judge distinguished the facts in the case referred to by learned counsel in *Hollebone v. Midhurst and Fernhurst Builders* [1968] 1 Llyod's Rep 38 with the facts in the instant case. In *Hollebone (supra)*, the plaintiff's house caught fire due to the admitted negligence of a workman
B employed by the second defendant ie, it was an action in tort. The second defendant admitted liability but contended that with regard to damage to the house, it should be based on the difference between the value before the fire and after the fire. After reviewing a number of English cases referred to him, the official referee held as follows:

C [1] that, on the facts of this case the plaintiffs' house was unique and plaintiffs acted reasonably in having damage made good; that those authorities relied on for the statement that measure of damage was not cost of reinstatement could be distinguished on their facts or conflicted with other authorities which were to be preferred where cost of repair or replacement was held to be the proper measure of damage; and that,
D therefore, in this case, correct measure of damages was cost of repair.

[60] Hence, in contrast, the damages claimed by the plaintiff herein is not a cause of action in tort but is premised on a statutory remedy provided under sub-s. 329(1) of the NLC. Its purpose is to compensate the plaintiff and not to cause an unjust enrichment to the plaintiff. Since the court has allowed the
E plaintiff's claim on interest which it could have been earned but for the private caveat, it is only fair that the claim for diminution of the value of the said land is disallowed.

[61] We are of the view that there is no manifest error in the above findings of the learned judge and affirmed the said findings.
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[62] Last but not least, we agree that the cost incurred in obtaining a report and valuation of the property in the sum of RM99,269 being the professional fees and reimbursement as per the invoice by Henry Butcher Malaysia (Kedah) Sdn Bhd dated 11 May 2017 be allowed.

G **Conclusion**

[63] Based on the reasons as adumbrated above and in all the circumstances, it is our unanimous decision that there is no merit in both the appeals. We dismiss both appeals and each party bears its own cost.

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